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Nos. 85-2169 & 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAINT FRANCIS COLLEGE, *et al.*,
Petitioners,
v.
MAJID GHAIDAN AL-KHAZRAJI,
Respondent.

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,
v.
JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Fourth Circuits

MOTION FOR LEAVE TO FILE, AND BRIEF OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS AMICUS CURIAE SUPPORTING RESPONDENT MAJID GHAIDAN AL-KHAZRAJI AND PETITIONERS SHAARE TEFILA CONGREGATION, ET AL.

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MOTION OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee pursuant to Rule 36.2, hereby moves for leave to file the attached brief amicus curiae supporting the petition for writ of certiorari. Consent to file the brief has been obtained from all of the petitioners and from the only respondent who entered an appearance in this court, letters expressing such consent have been lodged with

the Clerk of this Court. Because the amicus has been unable to obtain consent from the remaining respondents, most of whom could not be located, this motion is necessary.

The background and concerns of the amicus are fully set forth in the Interest of Amicus Curiae section of the attached brief. In sum, the American-Arab Anti-Discrimination Committee has sought since its inception to promote mutual understanding among all Americans and to combat ethnic, racial, national origin and religious prejudice in the United States.

The amicus believes that the decision of the court below in *Shaare Tefila v. Cobb* improperly deprives Arabs, Jews and other minority group members of the protections afforded by 42 U.S.C. sections 1981 & 1982, and further compounds the confusion among the lower federal courts as to the proper scope of that statute, and that the decision of the 4th circuit in *Al-Khazraji v. Saint Francis College* represents a view of the coverage of these statutes which is more consistent with the intent of Congress and with the actual dynamics of racial discrimination.

Respectfully submitted,

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QUESTION PRESENTED

Whether 42 U.S.C. sections 1981 and 1982 protect Arabs, Jews and other groups, classified as "Caucasian", and not defined in terms of skin color, from discrimination based on a belief that they are racially distinct.

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BRIEF AMICUS CURIAE OF THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE IN SUPPORT OF RESPONDENT MAJID GHAIDAN AL-KHAZRAJI AND PETITIONERS SHAARE TEFILA CONGREGATION, ET AL.

INTEREST OF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee (ADC), which was founded in 1980 to defend the civil rights of people of Arab descent and to promote their rich ethnic heritage, is a grassroots advocacy organization based in Washington, D.C. The ADC serves a national membership of Arab-Americans, joined by persons of all ethnic origins, who are committed to challenging defamation and discrimination wherever they occur.

The ADC was founded partly in response to the ABSCAM operation and similar incidents of racial stereotyping of and discrimination against Arab-Americans. The ADC works toward protecting the civil rights of all people and assuring equal treatment under the law, regardless of race, religion, national origin, sex, or any other basis of invidious discrimination.

The American-Arab Anti-Discrimination Committee's interest in these cases stems from its general goals of promoting and securing civil rights and equal justice, from its mission to fight discrimination and violence against Arab-Americans, and from its own experience as a target of such discrimination. The ADC has been the victim of several violent incidents, which the FBI believes were perpetrated by extremist groups who seek to interfere with Arab-Americans' exercise of their civil rights. Accordingly, the ADC appears as *amicus curiae* to urge this Court to hold that 42 U.S.C. sections 1981 and 1982 protect all victims of racially-motivated discrimination and violence.

SUMMARY OF ARGUMENT

These cases raise the issue of whether Arabs, Jews and other groups not defined in terms of skin color and taxonomically classified as Caucasian, but subject to discrimination on the basis of a belief that they are racially distinct groups, are protected under sections 1981 and 1982, two civil rights statutes derived from the 1866 Civil Rights Act.

Since lower courts are divided as to whether scientific classifications of race should be used in order to determine whether a particular plaintiff may state a claim under sections 1981 and 1982, or whether a broader test of racial discrimination should be used, we urge this Court to clarify this issue. A test of the coverage under these acts such as the one employed by the Third Circuit

in *Al-Khazraji v. St. Francis College*, which does not adopt a static system of racial classification is consistent with the legislative history and the previous interpretations of the statutes made by this Court. In addition, it is consistent with the purpose of the Act to ensure equal civil rights to all persons regardless of race or color.

ARGUMENT

I. The fact that an individual plaintiff is not dark in skin color or that he belongs to a group which is classified as "Caucasian" under one scientific system of racial classification should not present a barrier to stating a cause of action under sections 1981 and 1982, since these statutes prohibit all acts of discrimination which are racial in character.

No static system of racial classification can be drawn from the language and legislative history of the statute, or from the scientific, popular or legal usage of the term "race." All of these sources indicate that the concept of "race" is flexible and that classifying persons according to race should not be the basis for determining coverage under these statutes. Even assuming that such a system of racial classification could be ascertained, the public interest calls for courts to refrain from subjecting victims of discrimination to racial tests, whether based on physical characteristics, ancestry, or appearance, for the purpose of determining whether their claim can be heard. The correct standard is whether the acts of discrimination are "racial" in character, *i.e.*, whether they are based on the categorization of the victim as a member of a group sharing certain immutable characteristics.

Claims brought by Arabs, Jews and other minority groups under sections 1981 and 1982 have been dismissed by some courts as not stating a cause of action for race discrimination because such groups are not distinct "races", or because plaintiffs are not of a different skin color from defendants. The Third Circuit Court of

Appeals was correct in rejecting such arguments in the *Al-Khazraji* case. However, other courts, such as the Fourth Circuit in the *Shaare Tefila* case, have incorrectly adopted such a biologically-based notion of "race" to exclude plaintiffs who are Jews, Arabs, or members of some other group not falling within a scientifically recognized racial category from the coverage of this Act. This flies in the face of the legislative history, as well as the actual dynamics of racial discrimination, which is not based strictly on biological criteria.

This court has not previously had occasion to deal with claims brought by persons who are Caucasian, but are perceived by defendants as "non-white" or of a distinct race. However, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976), this Court construed the addition of the phrase "as is enjoyed by white citizens" in these statutes in accordance with statements in the Legislative history to have been a technical correction meant to indicate that the statute is racial in character and would not apply to discrimination against women and minors. Rep. Wilson, who proposed the amendment explained that: "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.", Cong. Globe, 39th Cong., 1st Session 157 (1866). This Court further stated that the statute was not meant only to protect blacks, but to protect all persons from racial discrimination.

Lower courts which have attempted to articulate a definition of "race" for purposes of determining applicability of these statutes in cases such as *Al-Khazraji* and *Shaare Tefila* have generally found that establishing a fixed definition of race is impossible, because the groups defined as distinct races vary considerably in the scientific, popular, and legal usage of the term. There is not now and was not in 1866 anything approaching

a consensus as to the meaning of race.[1] Even if a static, scientific definition of race were accepted, intermixture of population groups and environmental factors cause changes in the physical characteristics of populations. Similarly sociological factors cause popular conceptions of race to change. Today, many anthropologists denounce the concept of race because of its use as a justification for discrimination against ethnic groups. The Nazi's use of racial stereotypes to promote the "Final Solution" made the horrible potential for misuse of racial terminology apparent.

A view which has gained some influence in the lower courts, is that coverage extends to groups who are discriminated against based on a common understanding that they are of a distinct or "nonwhite" race, and are therefore erroneously believed to share certain immutable characteristics. In view of the fact that Al-Khazraji, unlike some Arabs, is dark in skin color and alleged discrimination on this basis, the court's decision could also have been supported by cases involving Arab plaintiffs which have held this more restrictive view that only dark-skinned Arabs may state a claim under section 1981.[2] However, the Third Circuit correctly chose not to adopt such a restrictive reading.

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[1] One nineteenth century scientific system contained 29 races; another lister four. See Dictionary of Races or People, S. Doc. No. 662, 61st Cong., 3d Sess. 3 (1911)—quoted in Greenfield & Kates, "Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866", 63 California Law Review 662 (1975).

[2] See *Abdulrahim v. Gene B. Glick*, 40 FEP cases 481 (N.D. Indiana, 1981) (Plaintiff of Palestinian or Syrian origin can sue under section 1981 for race discrimination where it is alleged that his skin color is such that he can be considered "non-white"); *Saad v. Burns*, 456 F. Supp. 33 (D.D.C. 1978) (Arab plaintiff directed to file more definite statement alleging race or color discrimination under section 1981, since it is insufficient merely to state that the plaintiff is "non-Caucasian"); *Ibrahim v. New York State Department of Health*, 581 F. Supp. 228 (E.D. N.Y., 1984)

The only other case which has dealt with a claim under these statutes on the basis of discrimination against Arabs was a recent 5th Circuit case, *Alizadeh v. Safeway Stores*, 802 F.2d 111 (5th Cir. 1986) which actually involved a woman who was married to an Iranian[3] who sued her employer, because she felt that she had been discriminated against because her husband was considered non-white. The court construed this as a claim involving Arab discrimination and held that such a claim is cognizable under section 1981 where Arabs are discriminated against by people who believe that they are of a nonwhite race.

The proper inquiry, as indicated by this Court in its previous decisions, is whether the discrimination is racial in character not whether the discriminatee or the group to which he belongs is racially distinct from white persons on the basis of some objective test of race. The *Al-Khazraji* and *Alizadeh* courts are correct that looking for a scientific definition of the term "race" to determine the coverage of the 1866 Act is fruitless as there are thousands of definitions of this term. G. Simpson and J.

(court granted motion to dismiss employment discrimination claim of Arab plaintiff under section 1981 since Arabs are not a "race" for the purposes of this statute. The court implied by relying on *Saad, supra*, that an allegation of color discrimination would be sufficient to state a claim.); *Anooya v. Hilton Hotels*, 733 F.2d 48 (7th Cir. 1984) (Section 1981 held inapplicable to claim by plaintiff alleging discrimination based on his "Iraqi origin" because no allegation of racial animus was inferable from the pleadings. The Court, however, noted decisions of this Court which have indicated that race and color claims are cognizable under section 1981).

[3] Iranians are not Arab, but the court discussed the case as if it involved discrimination against Arabs. This is actually a common misperception. While it is not clear from the opinion, defendants may very well have thought that plaintiff's husband was an Arab as well. See S. Slade, "The Image of the Arab in America. Analysis of a Poll of American Attitudes" 35 Middle East Journal 143, 148 (1981). 70% of Americans who responded to a 1980 poll by a private research organization believed that Iran is an Arab country.

Yinger, Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination" (1965), indicates that biological theories of race vary from the traditional view based on skin color to endocrine theories based on the thyroid gland.[4] Popular conceptions of race are similarly subject to change.

Any test of whether plaintiffs are "racially distinct" would necessarily be based on anthropological criteria which, besides being beyond the expertise of courts, are subject to change and disagreement in the scientific community. In fact, as noted above, many anthropologists have denounced the concept of race, recognizing the danger of such concepts being used as a justification for discrimination based on the erroneous notion that genealogical and physiological "racial" distinctions can be used to rank the "races" in some kind of hierarchy of value based on "immutable" psychological and sociological characteristics attributed to the "racial" groups.[5] Ironically, it was primarily the perversion of the race concept by the Nazi Party in Germany and the tragic result of this stereotyping of Jews and other groups which led many anthropologists to abandon racial classification,[6] and yet some courts such as the Fourth Circuit in *Shaare Tefila* refuse to recognize this type of discrimination as "racial" in character, because Jews do not fit into a biologically-based definition of race. Racism is not based on an objective biological classification of the races, it is based on a perversion of scientific concepts of race

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[4] R. Tekiner, "Jewish Nationality Status as Basis for Institutionalized Racial Discrimination in Israel", 17 Arab American Affairs 79.

[5] A. Littlefield, *et al.* 2 and 3, Redefining Race: The Potential Demise of a Concept in Physical Anthropology (1982). A survey of physical anthropology texts revealed that the no-race view was most prevalent by the end of 1970.

[6] Anthropologist Ashley Montagu recommended substituting "ethnic group" for "race" because people have fixed, false ideas about the meaning of race. A. Montagu, Man's Most Dangerous Myth: The Fallacy of Race (1946).

which uses a facially objective and scientific language to disguise a value system ranking groups of people into those of higher or lesser orders.

Popular concepts of race tend to confuse biology and culture while scientific use of the term remains strictly biological. Many writers who promoted the idea of racial superiority adopted anthropological language and created the impression that anthropologists approve of attributing psychological characteristics to races even though anthropological race classifications are actually based on physical characteristics. Such writers also attached labels to races misrepresented as valid scientific terms, such as "Aryan" and "Semitic" which are actually linguistic terms.[7]

Defendants in both *Al-Khazraji* and *Shaare Tefila* argued that plaintiffs who were Arabs and Jews were barred from stating a claim of racial discrimination under sections 1981 and 1982 because both plaintiffs and defendants were "Caucasian". The system of racial classification which divides people into one of three groups, Caucasoid, Negroid, or Mongoloid, is not now and was not in 1866 the only scientific system of classifying races. There is absolutely no indication in the legislative history or in the language of the statute which suggests that Congress intended to adopt this definition of the term "race". In fact, the term "race" does not even appear in the statutes. This court has construed the "white citizens" language in the statute to merely emphasize the racial nature of the rights guaranteed. The legislative history, in fact, indicates that the bill was meant to be broader than merely a protection of the civil rights of blacks.[8]

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[7] See R. Tekiner, Jewish Nationality Status as the Basis for Institutionalized Racial Discrimination in Israel" 17 American Arab Affairs 79 (Summer 1986).

[8] Senator Trumball who introduced the bill stated that "this bill applies to white men as well as black men. It declares that all

Moreover, the term "Caucasian" has not been used with precision, it has frequently been used to refer to persons with white skin color. Some Arabs and others who would technically be classified as "Caucasian" have dark skin color, and as a result there has been much confusion over whether such "Caucasians" who are dark in skin color (like Al-Khazraji) can sue other "Caucasians" under sections 1981 and 1982.

Legal definitions of race, like scientific and popular conceptions of the term, have varied widely and skin color and membership in the Caucasian race have never been consistently applied criteria. In *Lee v. New Orleans Great Northern Railroad Co.*, 125 La. 236, 51 So. 182 (1910) in which a white plaintiff sued a railroad for damages for assigning his two daughters to a "colored" coach, the court observed that "On the question of race, there is no legal presumption either way. The issue was one purely of fact, to be determined not only by evidence of the admixture of Negro blood, but by evidence of reputation, of social reception, and of the exercise of the privileges of the white man." 51 So. at 184. In *Gong Lum v. Rice*, 139 Miss. 760, 104 So. 105 (1925), a Chinese girl was prohibited from attending a white school, under a state constitutional provision that "(s)eparate schools shall be maintained for children of the white and colored races." The court discussed the term "white" as follows: "So far as we have been able to find, the word 'white' when used in describing the race is limited strictly to the Caucasian race, while the word 'colored' is not strictly limited to Negroes or persons having Negro blood." 104 So. at 108.

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persons in the United States shall be entitled to the same civil rights . . . ." Cong. Globe, 39th Cong., 1st Sess. 599 (1866). Senator Trumball also indicated that the act would "undoubtedly" cover gypsies, a group which would also fall under the classification of "Causasian" (*id* at 498), and there was discussion of whether the "German race" would be covered, indicating that Congress did not intend to adopt this three-race system of racial classification (*id.* at 4294).

Definition of "race" in state statutes and constitutions has varied widely both in terms of the persons included within particular racial groups and the groups affected. Constitutions and statutes of a particular state may even have defined the membership of certain racial groups differently depending on the purpose for which the classifications were used, e.g., some states had different definitions of race for purposes of concubinage or miscegenation statutes and statutes requiring racially segregated facilities.[9]

Legal tests of racial classifications are also instructive in terms of determining whether racial classifications based on physical characteristics should be used by the courts to decide whether a plaintiff can state a claim under sections 1981 and 1982. Statutory definitions of race were usually based on an individual's "blood", ancestry, appearance, or a combination of these factors. Tests based on "blood" were divided into the so-called proportion or percentage test and the ascertainable trace test. Ancestry-based tests usually provided that a person should be deemed a member of a (nonwhite) racial group if he has an ancestor who was a member of that group within a specified number of generations removed. Appearance-based tests were generally used for purposes such as enforcing laws providing for segregated facilities where a quick appraisal of physical appearances was necessary.[10]

Given this confusion in the definition of "race", it should not be the touchstone of coverage under the Civil Rights Act of 1866.

II. Claims by Arab or Jewish plaintiffs should not be considered to be based on national origin or religion rather than race, as a matter of law.

An allegation of racial discrimination under section 1981 or 1982 on the basis of Arab of Jewish origin

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[9] See Legal Definition of Race, 3 Race Relations Law Reporter 571, 572.

[10] *Ibid.* at 573.

should be sufficient to survive a motion to dismiss. As demonstrated in section three below, both of these groups are subject to discrimination which is racial in character. Although national origin or religious discrimination may in some cases be so closely intertwined with race discrimination that the two are indistinguishable, whether elements of racial discrimination are present in a particular act can only be determined on a case-by-case basis.

Courts faced with employment discrimination claims by Arab plaintiffs often have erroneously viewed them as national origin claims, suitable for consideration under Title VII rather than section 1981. Similarly, there is a tendency to assume that claims brought by Jewish plaintiffs must necessarily be based on religious discrimination and so are not enforceable under §§ 1981 & 1982.

The matter of whether nationai origin discrimination is cognizable under sections 1981 and 1982 has not been definitively decided, although this court has indicated in dicta that it is not.[11] However, some courts have held that national origin claims are cognizable under these statutes, where there are some elements of racial discrimination.[12]

Some courts and commentators have even stated that the fact that these claims may be cognizable under

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[11] In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), this court said in dictum that section 1982 reached only racial discrimination as distinguished from religious or national origin discrimination, and lower courts have generally held that national origin discrimination is not covered, see *e.g. Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1974) (Slavic Americans); *Kurylas v. Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1973) (Polish Americans).

[12] See, e.g., *Gonzales v. Stanford Applied Engineering*, 579 F.2d 1298 (9th Cir. 1979) (brown Mexican-Americans); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D.Okl. 1977) (Americans of Spanish descent); *Khawaja v. Wyatt*, 495 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani).

Title VII somehow has some bearing on whether a claim can be brought under section 1981. This is an erroneous argument since the issue is the intent of Congress in passing section 1981 rather than what is covered by other statutes.

It is possible that elements of both racial and national origin discrimination may exist in the same situation. It is erroneous for courts to simply assume that an Arab or a Jew can only be subject to national origin or religious discrimination. Allegations by these groups of racial discrimination should be enough to survive a motion to dismiss; the nature of the claim can only be ascertained by examining the facts of a given situation. The confusion between race and national origin is aggravated by the fact that the precise definition of "national origin" is also unclear.

Title VII, in fact, does not define the term "national origin." However, there was some discussion of the term in the legislative history. Congressman Dent (D. Pa.) stated that: "National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.[13] In *Espinoza v. Farah Manufacturing Company*, 414 U.S. 86, 6 FEP 933 (1973), in determining whether a refusal to hire on the basis of citizenship constituted a national origin claim, this court defined national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.* It will often be difficult to distinguish between national origin and race in particular cases since they will often be intertwined; however, a strict national origin claim is possible where a person is discriminated against solely because of the country from which he comes.

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[13] 110 Cong. Rec. 2549 (1964), quoted in Schlei and Grossman, p. 305.

Many incidents of violence and harassment directed at Arabs have occurred in response to events taking place in the Middle East such as the recent U.S. raid on Libya. Perhaps if such incidents were directed solely at Libyans, one could argue that they were based on national origin. However, every Arab and Arab-American is threatened by such senseless violence. In 1985, during the TWA hostage crisis in Lebanon, the Dar as-Salaam Mosque was severely damaged by two pipe bombs. The Islamic Society of Greater Houston, where this mosque was located, had received numerous threatening phone calls during this and other crisis situations in the Middle East. Sayed Gomah, Director of the Society, expressed his frustration at the recent Congressional subcommittee hearings on violence against Arab-Americans: "Despite our establishment in American Society as a religious entity . . . we are constantly viewed as a political entity responsible for the world's problems. When the U.S. Embassy in Tehran was taken, we were Iranians. When the Marine barracks were bombed, we were Lebanese. When the Achille Lauro was hijacked, we became Palestinian. When TWA Flight 847 was held, again we were Lebanese. Most recently, when the Gulf of Sidra became the target, we were declared Libyans." (House Committee on the Judiciary, Subcommittee on Criminal Justice, Congressional Hearings on Ethnically Motivated Violence Against Arab Americans, July 16, 1986)

As indicated by Sayed Gomah, anti-Arab discrimination is indiscriminately directed at all Arabs despite their particular national origin. As with the desecration of the Shaare Tefila synagogue, these acts are often motivated by hatred of Arabs and Jews as groups rather than by the victims' religious beliefs or practices, or national origin. The Shaare Tefila congregation was clearly not discriminated against because of their religious practices or beliefs. The 1972 amendments to Title VII added section 701(j) defining religion: "The term 'religion' includes all aspects of religious observance and practice, as

well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employee's business." The slogans painted on the synagogue clearly indicated that the perpetrators took their inspiration from the Nazi anti-Semitic attitudes based on erroneous concepts of racial inferiority. As the history of Nazi Germany proves, such feelings of hatred are not abated by religious conversion or suppression of religious practices. The Nazis attempted to identify persons with "Jewish blood" by investigating geneological records, even if such persons did not practice the Jewish religion.

III. Arabs and Jews are perceived by some people, as "racially" distinct, and have been the object of racial caricatures and steretoypes, which encourage and are used to justify discrimination. The civil rights of Arabs and Jews are endangered and will be diminished if they are not deemed to be within the protection of these statutes.

Clearly acts of discrimination against Arabs and Jews, such as those which occurred in the two instant cases are not based on some bizarre notion of race unique to the defendants. However, regardless of what precise percentage of the population holds such views, they present a palpable danger to the civil rights both of the victims and of other members of these groups, whose free exercise of their civil rights is "chilled" by the fear of racial violence, harassment, and discrimination.

Arabs and Jews have both historically been considered distinct groups or "races" and have been subject to discrimination on the basis of this perception. Both analysis of media coverage and attitude polls indicate a high frequency of stereotyping and negative images of Arabs.[14]

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[14] See S. Slade, "The Image of the Arab in America: Analysis of a Poll on American Attitudes" 35 Middle East Journal 143, 147-48 (1981). Results of a 1980 poll of American attitudes towards Arabs

In fact, the stereotypes of Arabs which are currently prevalent in the American media and society are similar to earlier stereotypical representations of Jews in Nazi Germany and elsewhere. Such attitudes indicate a climate favorable to discrimination which is racial in character.

Racism against both Arabs and Jews is often based on the erroneous linking of culture and biology.[15] Arabs and Jews both fall into the category of "Semitic," although the term "ant-Semitism" is now commonly used to designate a racist attitude against Jews. This 19th Century classification was actually linguistic, but also formed the basis for a racial theory.[16] Professor Edward Said has said that, "In the West, the Arab is frequently presented as a menace, a terrorist, a shadowy figure who

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indicates that a large percentage of Americans consider Arabs to be "barbaric/cruel" (44%), "treacherous/cunning" (49%) and "warlike/bloodthirsty" (50%). A large percentage view most Arabs as "anti-Christian" (40%). All of these traits imply hostility. In addition, Arabs, like Jews, are subject to a steretotype based on the perception that they are rich and greedy.

[15] See T. Gossett, Race, the History of an Idea in America 11 (1963).

[16] See E. Said, Orientalism (1978) documenting intellectual history of Western view of Orient—particularly Arab world—traces racist ideas against Arab world back as far as Crusades e.g. at 172 quotes Chateaubriand—Crusades not just about "deliverance of the Holy Sepulchre" but about opposition to "cult systematically favorable to ignorance (Islam); to decadance, to slavery" documents links made by philologists between linquistics and anatomy e.g. "One sees that in all things, the Semitic race appears to us to be an incomplete race, by virtue of its simplicity. This race—if I dare use the analogy—is to the Indo-European family what a pencil sketch is to a painting; it lacks that variety, that amplitude, that abundance of life which is the condition of perfectability. Like those individuals who possess so little fecundity that, after a gracious childhood, they attain only the most mediocre viriilty, the Semitic nations experienced their fullest flowering in their first age and have never been able to achieve true maturity." Renan, Oevres Complete, 8:156 quoted at E. Said, Orientalism (1978) at 159.

operates outside of the accepted value systems and is therefore to be feared and mistrusted. This racist image of the Arabs is nothing more than the result of the transference of the popular anti-semitic animus from a Jewish to an Arab target." [17] Although Jews are not biologically a separate race, the Nazi attitude towards Jews was racist in that it defined them as separate from the "Aryan" race. The Nuremberg Laws in Nazi Germany defined Jews biologically. The treatment of Jews was not based on religious practice or belief, since the Nazis sought to identify Jews who had assimilated and converted to Christianity in order to "re-judaize" them. It also was unrelated to national origin, since Jews of German ancestry were equally subject to atrocities as Jews of other national origins such as Polish, French, or Hungarian.[18]

This legacy of racism inherited from the nineteenth century, is carried over into present day views towards Arabs. "[W]hat has not been sufficiently stressed in histories of modern anti-Semitism has been the legitimation of . . . atavistic designations by Orientalism, and more

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[17] Edward Said quoted in Nick Thimmesch "The Media and the Middle East" 2 American Arab Affairs 79, 85 (Fall, 1982). Elsewhere Said discusses the dynamics of racist thought: "Theses of Oriental backwardness, degeneracy, and inequality with the West most easily associated themselves early in the nineteenth century with ideas about the biological bases of racial inequality. Thus the racial classifications found in (the works of this period) found a willing partner in latent Orientalism. To these ideas was added second-order Darwinism, which seemed to accentuate the "scientific" validity of the division of races into advanced and backward, or European-Aryan and Oriental-African. Thus the whole question of imperialism as it was debated by pro-imperialists and anti-imperialists alike, carried forward the binary typology of advanced and backward (or subject) races, cultures, and societies. E. Said, Orientalism (1978) at 207.

[18] See Greenfield and Kates, "Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866" 63 California Law Review 662, 678.

important . . . the way this academic and intellectual legitimation has persisted right through the modern age in discussion of Islam, the Arabs, or the Near Orient. For whereas it is no longer possible to write learned (or even popular) disquisitions on either "the Negro mind" or "the Jewish personality", it is perfectly possible to engage in such research as "the Islamic mind," or "the Arab character." [19] In fact, content analysis of news coverage and monitoring of television has indicated that, at least since 1956 Suez crises, American media have broadcast a predominantly negative picture of the Arab personality.[20]

Many Arabs have physical characteristics such as darker skin color which make them readily distinguishable and, therefore more vulnerable to racial discrimination. However, these exterior, visible differences become symbolic of invisible characteristics attributed to the group. Some have referred to this as "social race." These characteristics erroneously attributed to the group are the source of racial stereotypes. The social judgments and discriminatory denial of civil rights which they foster are the evils which sections 1981 and 1982 were meant to eliminate, and it is only an appreciation of this fact which can lend meaning to the statutes,[21] and allow them to fulfill the purpose expressed in the language and legislative history: to protect the civil rights of all persons regardless of race or color. In order to appreciate the inappropriateness of making color and other physical characteristics the determinants of coverage, one need only imagine the type of discrimination suffered by plaintiffs in the *Shaare Tefila* case as directed against Arabs, Hispanics or some other group referred to as a "race" whose members differ in skin color and other physical

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[19] E. Said, Orientalism (1978) at 262.

[20] *Ibid.* N. Thimmesch.

[21] *Ibid.*, Greenfield and Kates, at 679-680.

characteristics. If a mosque or Arabic cultural center were defaced with racist slogans and symbols as was the Shaare Tefila synagogue, would only those victims who can pass a test of skin color or some other physical trait be allowed access to the court in order to state their claim?

One need not merely imagine this situation, as violence and harassment of Arabs has been on the increase in recent years. In fact, the ADC has first-hand experience with this phenomenon since it has recently been a target of several violent incidents. The FBI has indicated that it believes that these and other acts of violence against Arab-Americans were motivated by anti-Arab animus. Alex Odeh, Regional Director of the ADC in Los Angeles, was murdered on October 11, 1985 when a bomb rigged to the door of the ADC office exploded as he arrived for work. In addition, on August 16, 1985 two Boston police officers were seriously injured when attempting to defuse a bomb left outside the ADC office in that city, and on November 29, 1985 the Washington, D.C. office was damaged by an arson attack. Other Arab-Americans have also been victimized by violence. Earlier this year on May 27, Professors Ismail and Lamya al-Faruqi were brutally murdered when they and their pregnant daughter were attacked at home in the middle of the night by an unknown assailant. The al-Faruqis were world renowned experts on Islamic thought and Arabic culture. The gravity of the situation is evident in the statement of FBI director William H. Webster delivered before the House Committee on the Judiciary on February 28, 1986, that the FBI considers the potential for violence by extremist groups against Arab-Americans to be quite high. On another occasion, Webster, in a speech at the National Press Club, said that Arab-Americans have entered a "zone of danger." [22]

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[22] "FBI Chief Warns Arabs of Danger", *The New York Times*, December 11, 1985, at p. A19.

Both Jews and Arabs, are victims of hate and violence. The rhetoric of extremist groups with an anti-Jewish bias, such as the Ku Klux Klan and Neo-Nazi organizations, are paralleled by that of anti-Arab extremist groups such as the Jewish Defense League and the Jewish Defense Organization. Jews and Arabs should be afforded the protection of these Civil Rights Act because they have been and are still perceived by some to be "racially" distinct groups, and because they are victimized by violence and discrimination based on this perception. How widely such views are held or how frequent the incidents of violence occur is not the point. These incidents are no less grave to their victims, and no less based on racial grounds, regardless of whether the majority of the population holds these ideas.

It has been said that a subjective test of defendant's belief that plaintiffs belong to a distinct race would open the courts to litigation based on defendant's irrational conceptions of race not tied to any common understanding of the term. In the instant cases, the racial animus in discriminating against Arabs and Jews is not derived from some unique notion concocted by defendants. In such cases, the subjective belief of defendants is connected to an external racist ideology. As discussed above, there is a perception held more widely than by these defendants that Arabs and Jews are racially distinct groups. It should not be required that the racist perceptions of the group be so common that they are shared by most people, or so acceptable that they are frequently expressed openly. An allegation of racial discrimination on the basis of the fact that plaintiff is an Arab or a Jew should be sufficient to survive a motion to dismiss. Whether or not racial discrimination has actually occurred can only be determined by a review of the facts of each individual case. Such an approach would maintain the racial standard articulated by this Court, and yet employ the standard flexibly enough to deal with the realities of racial discrimination.

CONCLUSION

For the foregoing reasons, the amicus urges the court to affirm the decision of the Third Circuit, to reverse the decision of the Fourth Circuit, and to resolve these cases in a manner such that it is clear that the protection of these statutes is available to all Arab and Jewish victims of racial discrimination.

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